IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1573 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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POPATBHAI DAHYABHAI PARMAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MR US BRAHMBHATT for Appellant(s) : 1,MR RAJESH M AGRAWAL for Appellant(s) : 1,

MR KT DAVE, Additional Public Prosecutor for
Opponent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 25/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The appellant – original accused has filed this appeal under Section-374(2) of the Criminal Procedure Code against the judgment and order dated 22.10.2003 passed by the learned Special Judge, 1st Fast Track Court, Jamnagar, whereby the appellant – original accused was convicted for an offence under Section-20(a)(i) read with Section-20(b)(ii)C of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and was sentenced for the R.I of 10 years with fine of Rs.1 lac (Rupees One Lac Only) and, in

default thereof, S.I of 1 year for the offence punishable under Section-20(a)(i) of the Act and RI for 10 years and fine of Rs.1 lac and in default thereof S.I of 1 year for the offence punishable under Section-20(b)(ii)C of the Act. The learned Special Judge has, however, held that both the sentences were run concurrently.

2. The appeal was admitted by this Court on 10.8.2004. Since the appeal was preferred through jail it appears that no prayer for bail was made and hence it was not considered while admitting the appeal.

3. The prosecution story in short is that :-

4. The complainant, Mr.R.B.Gadhvi – PSI Dhrol, Police Station – Dhrol has filed a complaint on 5.10.1999 that at 9.15 o'clock in the morning, he with his staff – and unarmed head-constable – Ganubhai Gajubha, a

Police Constable – Kishorsinh Pravinsinh and Police Constable – Babbha Velubha started in a government jeep for the investigation in Dhrol Police Station I CR No.89/1998 under Section-420 406 of IPC in Dhrol Town Area. When they reached near Morbi naka at about 14.00 hours in the afternoon, they received an information that a farm of one Satvara Popatbhai Dahyabhai is situated near Brahmnath Temple on a village kachcha way – cart road – going from Vagudali Chavanla to Latipur. There is also residential house of Satvara Popatbhai Dahyabhai in the said farm where he resides. Popatbhai Dahyabhai Satvara has cultivated psychotropic substance like 'ganja' illegally in his farm. He has plucked the branches and leaves from ganja being riped on the ganja plant and placed in small bags and has hidden the same in his house. On receiving the said information it was conveyed by the wireless set of the government jeep from Bhogvardhi to the Circle

PSI Dhrol for going in the first raid. The wireless operator at Morbi gate was informed to convey the same to the police station. On the same day the Executive Magistrate and Mamlatdar Dhrol was forwarded a report in writing with a head constable – Ganubha Gajubhai from Mukad to accompany in the raid. Accordingly, both the aforesaid gazetted officers came and local panchas (1) Limbabhai Hakubhai Varu Bharvad aged 33 years residing at Dhrol Bharvad Street and (2) Vasudev Mojanlal Parmar Kadiya aged 32 years residing at Dhrol were also called at Morbi gate near Darbargadh. Both of them were explained the facts and then the panchas and officers of the raiding party and the vehicle were checked and it was ascertained that any objectionable or illegal article was not with either any person or in the vehicle. Then a preliminary pachnama was prepared between 11.15 to 11.30 hours regarding the materials like weighing scales with measures, vax for

seal and other necessary articles for raid. The panchas and gazetted officer and staff etc, set in the government vehicle and passed through the Morbi naka gate and proceeded on a kachcha road going towards Brahmnath Mahadev Temple opposite to Vadudaliya Vokla (small track) and then on turning left side on a cart road going towards Latipur and stopped near the gate of Satvara Popatbhai Dahyabhai farm. Mr.Gadhvi with the panchas and officer of the raiding party and other persons got down from the vehicle and entered by opening the gate of the farm. There is house having covered varanda and a room with a terrace. There is small open coat-yard on other side thereof. One person was sitting on a coat. Upon asking his name, he stated his name to be Popatbhai Dahyabhai Satvara aged 60 years residing near Brahmnath Temple, Vadi area, Dhrol. Mr.Gadhvi introduced him self as a Police Officer to him and also got introduced an Executive Magistrate & Taluka

Mamlatdar, Dhrol and CPI – N.B.Vghela, Dhrol etc. Popatbhai Dahyabhai Satvara was explained that they have received an information that he has cultivated psychotropic substance ganja illegally in a portion of his farm and placed in small bags and also has hidden the same in the house. So a search was required to be carried out in his farm and residence. Whether he wanted to check any police officers or the panchas etc, and also wanted to keep any other higher officer than the officer who is present ? He was explained accordingly and he stated that as the Mamlatdar and Panchas were present, no other person was necessary and he had no objection, if the search was carried out in their presence. Thereafter, Mr.Gadhvi, Police Officers and the panchas took Popatbhai Dahyabhai to an adjoining premises having terrace and as the doors were opened, they entered in the room through the Varanda. Three bags, filled with ganja, were found in

a corner near northern side wall on right side while entering the room. In preliminary checking, 3 bags were filled with ganja. In the bag no.1 8.200 gram ganja valuing Rs.12,300/-, in bag no.2 7.600 gram ganja valuing Rs.11,400/- and in bag no.3 8.600 gram ganja valuing Rs.12,900/- in all 24.400 gram psychotropic substance ganja valuing Rs.36,600/- were found in 3 bags from the room of the house. On asking as to how the said ganja was received and possessed by him, he stated that the same were planted in an uncultivated grass portion on the north side in the farm and he himself cut the branches after being ready and placed its leaves etc in bag for sell. Thereafter 100 – 100 gram ganja was taken out as sample from the said bag of psychotropic substance ganja found as above and kept in plastic bags and packed in 3 different cloth bags and the slips bearing signatures of the panchas were placed therein and also fixed thereon and then sewed with

thread and vaxing seal of PSI Dhrol was affixed. Similarly the remaining ganja was kept as it is and the slips bearing signature of the panchas were kept and then packed the same and also seized as per the panchnama. This Popatbhai Dahyabhai himself planted the ganja and cut the same and hidden with branches etc. The remainders of ganja plants were lying there and the same being shown in presence of the panchas, they were uprooted and seized. The said ganja plants with root and branches valuing Rs.00/00 were packed in bundle and seized for investigation. The slips bearing signatures of the aforesaid panchas were fixed on the said packings as per the panchnama and sealed with vaxing seal. Thus, Satvara Popatbhai Dahyabhai residing near Brahmnath Temple, Vadi area, Dhrol has cultivated illegally the psychotropic substance ganja without any pass or permit in the farm occupied by him and prepared ganja and filled in 3 small bags and

thereafter hidden the same in his house. The same being found therefrom, he has committed an offence under Section-20(a) and (b) of NDPS Act, 1985 and he has been arrested for the said offence. He was arrested after explaining him the reasons, in detail, for his arrest and thereafter he was arrested as 17.45 hours on 5.10.1999 for the aforesaid offence.

5. To prove the culpability of the accused the prosecution has examined as many as 10 witnesses, details of which are as under:-

Sr.No.	Particulars	Exh.No.	Page No.
1	P.W No.1 – Vasudev M. Parmar.	8	91-98
2	P.W No.2 – Hasmukh B. Vanand.	9	99-102
3	P.W No.3 – Limbabhai H.B.	15	119-122
4	P.W No.4 – Kalyanji V. Bhatt.	16	123-128
5	P.W No.5 – Mahesh H. Trivedi	18	131-134
6	P.W No.6 – Babulal C.K.	24	145-154
7	P.W No.7 – Somaji Bhathaji.	27	159-162
8	P.W No.8 – Manuba B. Vadhela.	31	171-180
9	P.W No.9 – Prabhat S. Barya.	34	187-192

Sr.No.	Particulars	Exh.No.	Page No.
10	P.W. No.10 – Ramesh A. Gathavi.	38	201-228

6. Prosecution has also produced as many as 6 documents and relied upon the contents of the same, details of which are as under:-

Sr. No.	*Particulars*	*Exh. No.*	*Page No.*
01.	Charge-sheet.	1	21-22
02.	Charge.	5	33-36
03.	Station Diary Entry	35, 37	193-194 & 197-200
04.	Panchnama.	42	237-246
05.	FIR.	43	247-258
06.	FSL Report.	55, 56	287-294 & 295-296

7. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge, 1st Fast Track Court, Jamnagar, explained to the accused the circumstances appearing against him in the evidence of the

prosecution witnesses and recorded his further statement under Section-313 of the Code. In his further statement, the accused has denied the case of the prosecution by reiterating that he has been falsely implicated.

8. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Special Judge, 1st Fast Track Court, Jamnagar, has held that the accused is guilty of committing an offence under Sections-20(a)(i) and 20(b)(c) of the Act and he was convicted of the said offence.

9. Learned Special Judge, 1st Fast Track Court, Jamnagar, thereafter heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, accused was sentenced to suffer R.I of 10

years each and fine of Rs.1 lac each and in default thereof, S.I of 1 year each for offence punishable under Section-20(b)(a)(i) and Section-20(b)(ii)C of the Act.

10. Being aggrieved by the said judgment and order, the accused has filed the aforesaid appeal before this Court.

11. At the time of hearing of the appeal Mr.U.S.Brahmbhatt, learned advocate appointed through Legal Aid Committee has stated that he has already returned papers to the registry and Mr.R.N.Agrawal, learned advocate is appearing on behalf of the appellant – accused. Mr.R.N.Agrawal, learned advocate has made it clear that he is not challenging the order of conviction and he was addressing the Court only on the question of sentence. Since he has not challenged the conviction it is not necessary for this Court to reappreciate the evidence. As far as

imposition of sentence is concerned, Mr.Agrawal submitted that the offence is committed on 5.10.99 and the appellant – accused is in the custody from that date. The appellant – original accused is convicted on 22.10.2003. When the offence was committed the Old Act was in force. The Act was amended with effect from 2.10.2001. Under the Old Act the cultivation, production, manufacturing selling, purchasing, transporting warehousing, using, consuming etc, of ganja is prohibited under Section-8(c) and punishment for such production, manufacturing etc was imposable under Section-20(a)(i) and Section-20(b)(i) for a term which may extend to 5 years and to pay fine which may extend to Rs.50,000/-. Under the amended Act, which has come into force with effect from 2.10.2001, the cultivation, production, manufacturing etc, of ganja is punishable under Section-20(a)(i) and 20(b)(ii)C with rigorous imprisonment for a term

which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees.

12. Mr.Agrawal has, however, submitted that Section-41 of the Amended Act, 2001 provides that any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence. Thus, on 5.10.1999 when the offence was committed it was punishable with imprisonment for 5 years. The provisions of the amended Act would not be applicable and hence under no circumstance the appellant-accused could have been convicted for any term larger than the term of 5 years. Mr.Agrawal has, therefore, submitted that the appellant is in jail since 5.10.1999 and as on today he has already

completed more than 7 years. His confinement beyond 5 years would be totally illegal and unjustified and hence the appellant-accused deserves to be released forthwith.

13. Mr.K.T.Dave, learned Additional Public Prosecutor, on the other hand submitted that during the course of investigation and trial the Amended Act was very much in force and the date on which the Session Case was decided by the learned Special Judge, 1st Fast Track Court, Jamnagar, the Amended Act is in force and hence the punishment of R.I of 10 years for each offence is rightly imposed by the learned Special Judge, 1st Fast Track Court, Jamnagar, and no interference is called for, especially when the appellant-accused has not pressed his ground challenging the conviction.

14. To appreciate the controversy raised before the Court, it is worthwhile to have a

close look at the relevant provisions of the Act. Section-8 prohibits certain operations. Sub Section-(c) of Section-8 says that, *"No person shall - produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance."*

15. Section-20 of the Act imposed punishment for contravention in relation to cannabis plant and cannabis. Section-20(b) reads as under :- *"Whoever, in contravention of any provisions of this Act or any rule or order made or condition of license granted thereunder:-*
produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable, -
(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

16. By virtue of the Narcotic Drugs and Psychotropic Substances Act, 2001 Section-20(b)(ii) is amended and after its amendment it reads as under :-

"Section-20 Punishment for contravention in relation to cannabis plant and cannabis – whoever, in contravention of any provisions of this Act or any rule or order made or condition of license granted thereunder,-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial

quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.)

17. Section-41 of the Amendment Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of this Amendment Act reads as under:-

"Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and

accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal."

18. Section-41(1) has come up for consideration before the Hon'ble Supreme Court **in the case of Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609**. It is observed by the Hon'ble Supreme Court that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions

of the 1985 Act as amended by the Act of 2001. In other words, the benefit of the rationalised sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of

the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

19. From the aforesaid observations made by the Hon'ble Supreme Court, it is clear that the Hon'ble Supreme Court was mainly concerned in that case with rationalisation of the sentence structure. The controversy which arises before this Court in the present appeal was not there before the Hon'ble

Supreme Court. However, the observations which have been made to the effect that if the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1), would certainly help the present appellant and it would be a guiding factor to resolve this controversy. The Court was also mindful of the fact that the amendment in the form of rationalising the sentencing structure is more beneficial to the accused and amount to mollification of the rigour of the law. However, if on the basis of this amendment a person who has committed the offence prior to this amendment, subjecting him conviction and sentence of 5 years and whose offence was investigated and tried after the said amendment shall not be made him liable to the enhanced sentence of 10 years instead of 5 years, as it would certainly hit by rules against post facto

legislation contained under Article-20(1) of the Constitution of India.

20. Article-20(1) reads as under :-

"Article-20(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

21. Prohibitions imposed by Article-20 are directly relevant to the criminal process. Clause (1) is concerned with the substantive law of criminal liability and penalty. Later portion of this article clearly reveals that no person shall be subjected to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence admittedly committed on 5.10.99. On

that date, old provisions are in force and for commission of such offence, the accused appellant was liable to be sentenced for imprisonment of 5 years and fine of rupees fifty thousand and in default thereof S.I of 6 months. If the amending provisions are made applicable to the appellant's case in that case the appellant-accused would be liable to be sentenced for R.I of 10 years with fine of Rs.1 lakh and in default thereof S.I of 1 year. This should not be the intention of the legislature and it would hit by the rule against post facto legislation contained in Article-20(1) of the Constitution of India.

22. It is very unfortunate that the learned Special Judge, 1st Fast Track Court, has gravely erred in awarding the sentence for RI of 10 years each with fine of Rs.1 lac each and default thereof S.I of 1 year each is not at all justified. Mr.Agrawal is right in his

submission that since the alleged offence was committed on 5.10.1999 and case was pending when the amendment Act of 2001 came into force, the provisions of Old Act would be applicable and the appellant – accused could not have been sentenced for more than 5 years and could not have been imposed fine of Rs.1 lac. Since the learned Special Judge, 1st Fast Track Court, Jamnagar, has sentenced the appellant – accused for RI of 10 years each and imposed a fine of Rs.1 lac each the order passed by him is bad in law and against the provisions of the Act and hence the same is required to be quashed and set aside. It appears that the learned Special Judge, 1st Fast Track Court, Jamnagar, has not taken into consideration this aspect of the matter and without any application of mind straightway imposed the sentence of RI of 10 years each and fine of Rs.1 lac each under the amended provisions. The appellant accused should have been sentenced only for

RI of 5 years with fine of Rs.50,000/- and in default thereof to undergo S.I of six months. Since the appellant – accused has already undergone the sentence for more than 7 years which is more than the sentence imposable under the old provisions even with default of fine i.e 5 years and six months, no further sentence is required to be undergone by the appellant – accused.

23. While taking this view, we derive support from the decision of this very Bench of this Court **in case of Thakarshi Naranbhai Patel vs. State of Gujarat & Another, reported in 2006(3) GLH 603**, wherein on identical facts, the sentence was reduced from 10 years to 5 years by considering the old provisions of the Act.

24. In the above view of the matter, we partly allow this appeal and for the reasons stated hereinabove, reduce the sentence of 10 years

each with fine of Rs.1 lac each and in default thereof S.I of 1 year each to sentence of R.I 5 years with fine of rupees fifty thousand and in default thereof S.I of 6 months. Since the appellant has already undergone this sentence, we direct the jail authority to release the appellant-accused forthwith if his presence is not required in respect of any other case. This appeal is accordingly partly allowed.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

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